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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1966

No. 951

HARVEY B. COLLINS,

Petitioner,

vs.

GOVERNMENT OF THE VIRGIN ISLANDS OF THE UNITED STATES, GEORGE WADE, SR., AUBREY TODMAN, LUTHER BENJAMIN, CLIFFORD BENJAMIN and "JOHN DOE" a Person, Association or Incorporation, being a fictitious name, jointly, severally and in the alternative,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals for the Third Circuit

MELVIN M. BELLI
722 Montgomery Street
San Francisco, California 94111
Attorney for Petitioner.

Of Counsel:
ROBERT L. LIEFF
BELLI, ASHE, GERRY & ELLISON
722 Montgomery Street
San Francisco, California 94111
THOMAS D. IRELAND
MAAS AND IRELAND
P. O. Box 100
St. Thomas, Virgin Islands

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Melvin M. Belli, on behalf of Harvey B. Collins, petitions for a Writ of Certiorari to review the judgment of the Court of Appeals for the Third Circuit

entered in this case on September 14, 1966. Rehearing denied below October 10, 1966.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra,* pp. 1a-16a) is reported at 366 F.2d 279 (1966). The opinion of the District Court (App. B, *infra,* pp. 17a-29a) is reported at 236 F.Supp. 441 (1964).

JURISDICTION

The judgment of the Court of Appeals was entered on September 14, 1966 (App. C, *infra,* pp. 30a-31a). Rehearing was denied on October 10, 1966 (App. D, *infra,* pp. 32a-33a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Whether a defendant in a civil case can rely on a jury demand made by another defendant, who was dropped as a party before trial, if the issues involved with respect to each defendant are different?

(2) Whether a defendant in a civil case waives the right to a jury trial by going to trial after the trial Court orders a non-jury trial?

(3) Whether a defendant in a civil case waives the right to a jury trial by consenting to the dropping as a party another defendant who had made the only jury demand?

STATUTES AND RULES INVOLVED

Rule 38 of the Federal Rules of Civil Procedure provides in part:

> "(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.
>
> "(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.
>
> "(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by rule 5(b) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

Rule 39 of the Federal Rules of Civil Procedure provides in part:

> "(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by

jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court proceeding without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

"(b). By The Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any or all issues."

Act No. 921 of the Fifth Legislature of the Virgin Islands of the United States, approved January 25, 1963, provides:

"To Consent to the Institution of an Action in Court Against the Government of the Virgin Islands by Harvey B. Collins, in Connection With Personal Injuries Sustained by Harvey Collins.

"Be it enacted by the Legislature of the Virgin Islands:

"Section 1. Harvey B. Collins is authorized to file suit against the Government of the Virgin Islands on his claim for losses arising out of injuries sustained on February 4, 1961, as a result of an automobile accident as to which Harvey B. Collins alleges the Government of the Virgin Islands to be liable.

"Section 2. For the purpose of this Act and the adjudication of any such claim, the immunity of

the Government to suit is hereby waived and Harvey B. Collins may proceed against the Government as in the case of any other defendant, subject to the same procedures and defenses except for the defense of immunity from suit or of the statute of limitations, the provisions of which are hereby expressly waived; Provided, That nothing contained herein shall be construed as an admission of liability on the part of the Government.

"Section 3. The Claimant, Harvey B. Collins, shall commence the action authorized by this Act within two months from the effective date of this Act.

"Section 4. This Act shall take effect upon its approval."

STATEMENT

The Petitioner was seriously injured when the car which he was driving collided with a disabled truck on Harwood Highway, St. Thomas, Virgin Islands, in the early morning hours of February 4, 1961. The truck, which was owned by Luther Benjamin, had been left upon the traveled portion of the highway after it blew two rear tires during the afternoon of February 3, 1961. William Samuel Wade, the driver, did not report the breakdown to the authorities. The authorities subsequently became aware of the presence of the truck and they allowed it to remain on the highway throughout the afternoon and evening. Collins collided with the right rear of the truck while he was returning from town to the Submarine Base where he was stationed.

On February 1, 1963 Collins filed suit in the District Court of the Virgin Islands to recover for the injuries he received in the accident. He named as defendants the Government of the Virgin Islands, Luther Benjamin and William Samuel Wade. Only Luther Benjamin demanded a jury trial.

The Government of the Virgin Islands was named as a defendant pursuant to special legislation, Act No. 921, January 25, 1963, which authorized Collins to file suit against the Government and provided that he "may proceed against the Government as in the case of any other defendant."

On October 24, 1964, the morning of the trial, Petitioner moved to dismiss with prejudice the action against all defendants except the Government of the Virgin Islands. All parties agreed to this dismissal, and the District Court entered an Order accordingly. The Court then advised the Government of the Virgin Islands that the case would be tried without a jury since the Government did not demand a jury trial.

On the afternoon of October 24, 1964, the Government filed with the Court a written motion for trial by jury. The motion was directed to the discretion of the Court pursuant to Rule 39(b) of Federal Rules of Civil Procedure. The Court denied the Government's motion and the Government went to trial without a jury.

The trial took four days. On December 21, 1964, the Court entered its Findings of Fact and Conclusions of Law. The Court found that the Government of the Virgin Islands was negligent in that its agents

and employees after due notice, of the existence of a hazard, nuisance and breach of the laws, wilfully failed to keep the highway in reasonably safe condition and wilfully failed to administer, supervise and enforce the regulations and laws covering the operation of motor vehicles. The Court further held that the Government was negligent in that it wilfully failed to mark the truck's presence with appropriate lights and flares and wilfully failed to warn the users of the highway of its location and wilfully allowed the dangerous condition and nuisance to remain for many hours and negligently and wilfully failed to take any precaution to remove, abate, diminish, offset or counteract this dangerous condition and nuisance.

The Court further found that the truck constituted a public nuisance, an absolute nuisance under the laws of the Virgin Islands. The Court found that the misconduct of the Government of the Virgin Islands in omitting to perform its duties was wanton and wilful and that it was the proximate cause of the plaintiff's injuries. The Court further found that the plaintiff was not guilty of contributory negligence. On December 22, 1964, judgment was entered against the Government of the Virgin Islands in the sum of $550,000. (App. E, *infra,* pp. 34a-35a.)

The Court of Appeals reversed and remanded for new trial. The Court of Appeals held (366 F.2d 279, 285) "that where co-defendants are sued on the theory that they are jointly and severally liable for the same injury arising out of a single occurrence, a

request by one for jury trial on the issues of negligence and contributory negligence enures to the benefit of the other as well." The Court held that the Government of the Virgin Islands could rely on the jury demand made by the co-defendant Benjamin. The Court further held that the fact that Petitioner was allowed to drop his action against the individual defendant Benjamin with the consent of the Government of the Virgin Islands had no effect on the Government's right to a jury trial.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an important question of federal law, which has not been, but should be settled by this Court. The Court has also rendered a decision which, although not meeting the point head-on is in conflict with the decision of another Court of Appeals on the same matter. See *United Press Association v. Charles,* 245 F.2d 21 (9th Cir. 1957), cert. denied 77 Sup.Ct. 1378 (1957), *infra.*

The first question presented is whether a defendant in a civil case can rely on a jury demand made by another defendant, who was dropped as a party before trial, if the issues involved with respect to each defendant are different.

The Government of the Virgin Islands could not rely on the jury demand made by another defendant. A jury demand made by one defendant enures to the

benefit of another defendant only as to the *issues* embraced therein. This rule was recognized by the Court of Appeals (366 F.2d 279, 284) when it states that:

> ". . . the better rule is that a defendant can rely on the jury demand of a co-defendant to the extent of the issues embraced by that demand."

The Court of Appeals supported this statement by reference to the leading commentators on the Federal Rules of Civil Procedure.

In 5 Moore Federal Practice, Section 28.45, at 343-44 (2nd ed. 1964) it is stated:

> "In other words if a timely and proper demand for jury is made all other parties in the action who are affected by the demand may rely thereon and need not make a jury demand *for issues raised therein.*" (Emphasis added.)

In 2B Barron and Holtzoff, Federal Practice and Procedure, Section 877, at 49 (Wright ed. 1961) it is stated that:

> "Where a timely and proper demand for a jury is made by one party, all of the parties to the action who are interested *in the issues as to which jury trial has been demanded* may rely thereon and need not make an additional demand of their own." (Emphasis added.)

It is clear from the above quoted authorities that a party may rely on a jury demand made by another party with respect to those issues raised in the demand. As to issues not raised in the jury demand of another party, the party must make his own de-

mand. The problem then simply becomes one of determining which issues were in fact included within the demand made by the party requesting the jury.

In *McAndrews v. United States Lines Co.*, 167 F. Supp. 41 (S.D.N.Y. 1958) a personal injury action was brought against defendant United States Lines. The plaintiff demanded a jury. The defendant impleaded two third party defendants. The action by the plaintiff McAndrews against the defendant United States Lines was discontinued and the only action remaining was that between defendant United States Lines and one third party defendant. The third party defendant argued that the jury trial demand made by the plaintiff gave him the right to a jury trial in his case with the defendant.

The Court stated at page 43:

> "It is true that if a timely and proper demand for jury is made, all other parties in the action who are affected by the demand may rely thereon and need not make a jury demand for issues embraced therein. 5 Moore's Federal Practice, pages 343-344, Section 38.45 . . .
>
> "However, no demand was made by either party as to the *issues* now about to be tried. The United States Lines Company is not benefited by any vicarious demand made for a jury trial by the plaintiff as to issues between plaintiff and the United States Lines Company. As to these *issues*, therefore both parties have waived a jury." (Emphasis added.)

The Court of Appeals attempted to distinguish *McAndrews v. United States Lines Co., supra*, by

stating that a theory of reliance will not aid a defendant where a jury trial is sought as to third party issues and the only demand for a jury trial was that indorsed upon the original complaint. However, *McAndrews* was concerned with the problem of different *issues* being involved with respect to the third party defendant and not with the fact that he was a *third* party. As long as the issues were different there could be no reliance on the jury demand.

The Court of Appeals referred to *De Pinto v. Provident Security Life Insurance Co.*, 323 F.2d 826 (9th Cir. 1963), cert. denied 376 U.S. 950 (1964). It was held in *De Pinto* that when some defendants had not consented to the withdrawal of the jury trial demand of one of the plaintiffs, and other defendant *had* consented, the non-consenting defendants had not waived trial by jury. The Court in *De Pinto* at page 832 stated:

> "It is provided in Rule 38(d), Federal Rules of Civil Procedure, that the failure of a party to serve such a demand constitutes a waiver of trial by jury. But Rule 38(d) further provides that a demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties. It follows that failure to demand a trial by jury does not constitute a waiver if such a demand is withheld in reliance upon a demand filed by another party, and if withdrawal of the latter demand is not consented to."

It should be noted that in *De Pinto* the withdrawal of the jury demand was made by the plaintiff and the

defendants relied thereon. That is a very different case than the facts involved herein where the jury demand was made by one defendant and another defendant attempted to rely thereon.

The Court of Appeals attempted to meet this problem by stating (366 F.2d 279, at 285):

> "In this connection, Collins' contention that any reliance should be strictly limited to adverse parties is without merit. The language of Rule 38 refers to 'party' generally and cannot be read in the manner suggested by Collins."

However, the Court of Appeals cites no case authority for this proposition. In fact, all the cases dealing with the problem involve opposing parties.

It should be obvious that in multiparty cases a demand for jury trial made by a single defendant can only benefit a co-defendant with respect to the issues embraced in the original demand. Any other issues involving another defendant to be tried by a jury must be subject to an independent jury demand made by the other defendant. Only when the jury demand is made by the plaintiff can it possibly relate to all the issues involving all the defendants. In the situation when jury demand is made by a party on one side, the parties on the other side may rely on the demand since by definition the issues involving the opposing party must be identical.

The Government of the Virgin Islands benefited from the jury demand of Benjamin only with respect to contributory negligence. The complaint brought by

Petitioner alleged liability on the part of the Government of the Virgin Islands on three theories: negligence, maintenance of a nuisance and violation of statute. The complaint alleged the same three theories against the defendant Benjamin. However, the facts underlying the legal theories were very much different in the case of the two defendants. With respect to the Government of the Virgin Islands the complaint alleged negligence, the maintaining the public nuisance and the violation of the laws of the Virgin Islands.

With respect to the defendant Benjamin the complaint specifically alleged negligence in completely different areas. Negligence was alleged with respect of failing to have reflectors, illegally parking and abandoning a truck, not equipping the truck with the red tail lights, parking on a public street where it obstructed traffic, interfering with the usage of a public road, and the creating of a public nuisance. These alleged wrongs related to negligent conduct on the part of the defendant Benjamin in the *creation* of a nuisance and the violation of the laws of the Virgin Islands. The laws allegedly violated by Benjamin were different laws than those violated by the Government of the Virgin Islands.

In each case the allegations with respect to the defendant Benjamin were based on facts totally different from those allegations relating to the Virgin Islands. It would have been necessary for the trier of fact to make independent determinations with respect to the two defendants. The liability of one de-

fendant in no way was affected by the liability of the other.

The Court of Appeals attempted to meet the argument that the issues involved with respect to the two defendants were quite different by stating that:

> "Collins argues that the demand made by Benjamin cannot aid government because the 'issues' embraced within that demand are not the same as those between Collins and Government. He also urges that the theories of negligence are different as between Benjamin and Government and that the standard of care owed by Government is different as between the two. We do not find the differences asserted by Collins dispositive in the present situation." (366 F.2d 279, 285.)

The Court then goes on to state that this was an action brought by a single complaint against the Government and other defendants seeking to hold them jointly and severally liable for the same injury. The Court refers to Paragraph XVI of the Complaint.

Paragraph XVI of the Complaint states as follows:

> "That said accident and collision was caused by, precipitated through and was the proximate result of the carelessness, negligence, omissions and breach of duty of defendants George Wade, Sr., Aubrey Todman, Luther Benjamin, Clifford Benjamin, 'John Doe' and the Government of the Virgin Islands of the United States."

The Court of Appeals states that Paragraph XVI of the Complaint "charged the defendants jointly." (366 F.2d 279, 285.) The word "jointly" did not

appear in Paragraph XVI of the Complaint. The purpose of Paragraph XVI in the Complaint was merely to allege one of the necessary elements in a negligence case—proximate cause. The plaintiff lumped together the various defendants in one paragraph after previously setting out separate theories of liability. Then, in this paragraph the element of proximate cause was brought in. This was the sole purpose of the paragraph.

From this the Court of Appeals went on to hold that:

> "Where co-defendants are sued on the theory that they are *jointly* and severally liable for the same injury arising out of a single occurrence, a request by one for a jury trial on the issues of negligence and contributory negligence enures to the benefit of the other as well." (Emphasis added.) (366 F.2d 279, 285.)

Here the defendants were not jointly liable. Defendants were sued individually on totally different theories. The holding of the Court of Appeals may, on its face, be correct, but it does not apply to the facts herein.

In fact, when the holding of the Court is examined carefully, it appears that the only situation that it applies to is the one herein. For if a defendant withdraws his jury demand in the ordinary case, his co-defendants would then have to consent to the withdrawal of the jury demand. This is particularly true when they are in fact jointly liable, in that the issues are common to all. Thus, it is only in a situation

exactly as the one at bar when the plaintiff dismisses as against one defendant that this problem could arise. In that case, if the defendants are indeed jointly liable, then they would each be protected by the jury demand of any other defendants. If, as is here involved, they are not jointly liable then they are protected by the jury demand made by another defendant only as to the issues raised in that demand.

The Court of Appeals refer to *Spiro v. Pennsylvania R.R. Co.*, 3 F.R.D. 351 (S.D.N.Y. 1942). In *Spiro* plaintiff brought a personal injury action against the Pullman Company and the Pennsylvania Railroad. He made a timely jury demand as against defendant Pennsylvania Railroad, but did not do so against defendant Pullman. The Court held that plaintiff had preserved his right to jury trial as to the "separate liability" of Pennsylvania Railroad and the "joint negligence" of the defendants, but had waived it as to the "separate liability" of Pullman. However, the Court held that since all the issues but the "separate liability" of Pullman would be tried to a jury, the Court in its discretion, under Rule 39(b), could order that all the issues as to both defendants be tried to a jury.

The holding in *Spiro* was correct since "joint negligence" was involved there. However, if "separate negligence" had been involved in *Spiro* the Court would have held that Pullman would not have its "separate negligence" tried by the jury. The jury demand by the plaintiff in *Spiro* would have then embraced only the issues involved between Spiro and

Pennsylvania Railroad relating to the separate negligence and separate liability of Pennsylvania Railroad.

Although the Complaint in Paragraph XVI did not allege joint liability, it did lump together all the defendants. However, it is well established that the right to a jury trial must be determined not by the form of the Complaint but by an appraisal of the claims, defenses and remedies. It is the issues, not the form of the case, that will determine the method of trial. 2B Barron and Holtzoff, Federal Practice and Procedure, Section 873; *Fraser v. Geist,* 1 F.R.D. 267 (Penn. 1940); *Beaunit Mills v. Eday Fabric Sales Corp.,* 124 F.2d 563 (2nd Cir. 1942); *Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 477, 8 L.Ed. 2d 44 (1962) ("but the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings."); *Swofford v. B. & W., Inc.,* 336 F.2d 406 (5th Cir. 1964).

As indicated above the issues of negligence were totally different with respect to the two defendants. If contributory negligence could be asserted as a defense here (see *infra*), then only that issue relating to contributory negligence would be common to both defendants. In that case the jury demand made by Benjamin would embrace within it the issue of contributory negligence and the Government of the Virgin Islands would benefit to that extent by the jury demand made by Benjamin. The conduct of Petitioner, if it could be construed as contributory negligence, and if contributory negligence were a valid

defense, would be based on the same facts with respect to both defendants. However, the trial Court held that the plaintiff was not guilty of contributory negligence.

Contributory negligence would not be a defense here. Contributory negligence is not a defense to a public or private nuisance. Prosser on Torts, 3rd edition, Section 92.

In 38 Am.Jur.2d (Negligence), Section 200, it is stated:

> "The cases are in substantial agreement that the ordinary rule of contributory negligence, which defeats recovery altogether in actions based on negligence as distinguished from nuisance, does not apply in the case of an absolute nuisance."

Contributory negligence is not a defense to a violation of a statute. Restatement of Torts, Section 483, states:

> "The plaintiff's contributory negligence bars his recovery for the negligence of the defendant consisting of the violation of a statute, unless the effect of the statute is to place the entire responsibility for such harm as has occurred on the defendant."

Contributory negligence is not a defense to wilful and wanton negligence. It is stated in 38 Am.Jur.2d (Negligence), Section 178:

> "There is an abundance of authority for the proposition that contributory negligence is not a defense to an action based upon wilful or wanton conduct or intentional violence."

The second question presented is whether a defendant in a civil case waives the right to a jury trial by going to trial after the trial court orders a non-jury trial. The District Court advised the Government of the Virgin Islands, after the dismissal of Benjamin and the other parties, that the case would be tried without a jury. The Government protested that it was entitled to a jury by reason of its reliance upon defendant Benjamin's demand for a jury trial. Despite its protest, the Government of the Virgin Islands then proceeded to trial. By so proceeding to trial the Government of the Virgin Islands waived its right to jury, if indeed it had such right at this point. The Government of the Virgin Islands should, at this point, have refused to go ahead to trial. If the Government of the Virgin Islands had refused to go to trial, it could then have appealed from any determination made by the trial Court. This would have preserved its objection and would have preserved its jury right, if indeed it had one at that juncture. However, by deciding to go to trial, the Government of the Virgin Islands gambled and lost.

There is a case almost directly on point. In *United Press Association v. Charles,* 245 F.2d 21 (9th Cir. 1957), cert. denied 77 S.Ct. 1378 (1957) neither plaintiff nor defendant asked for a jury trial timely. Thereafter defendant filed a motion for a jury trial and the Court denied such motion and then the Court entered an order directing a jury trial sua sponte. Plaintiff objected but went to trial. Plaintiff ap-

pealed from an unsatisfactory judgment on the grounds that there was a jury trial instead of trial by judge alone. The Court held, at page 25, that:

> "United Press was plaintiff. It was under duty to refuse to go to trial before a jury, if it intended to rely upon this procedural objection. If then the judge had dismissed the action for failure to prosecute, the existence of a personal right not to go to trial before a jury could have been tested. *United Press has now gambled on a jury trial and lost.* By its conduct, *any right it had was waived.*" (Emphasis added.)

The Court continued at page 28:

> "It must be remembered that the trial judge could not foresee the result when he granted jury trial. Certainly, Charles could not foresee that the verdict would be in his favor, since he was apparently lukewarm on the subject. And, save for claiming that witnesses would be better than their depositions, United Press at no time urged that trial by jury would be prejudicial to its interest until the verdicts had been rendered. United Press should have refused to go to trial. *But it took a chance, as we have seen. In any event, the matter of jury trial must be considered as of the opening of the trial and not in light of the outcome.*" (Emphasis added.)

There is good authority for the proposition that the Government of the Virgin Islands could have refused to go to trial without a jury and then make an immediate appeal. In *Cataldo v. E. I. Du Pont De Nemours Co.*, 253 F.Supp. 235 (S.D. N.Y. 1966) plaintiff brought an action for injuries and amended the complaint alleging a new cause of action. In the

original action a jury demand had not been made, but then the plaintiff sought jury trial on the amended cause of action. The defendant claimed that the plaintiff had waived a jury under Rule 38(b). The District Court held that an immediate appeal to the Court of Appeals was proper by the defendant since if the determination was not reviewed until after the trial on the merits a whole new trial would be necessary, should the Court of Appeals find for defendant. The Court held that an immediate appeal would not in any way delay prosecution of the action and that since there was substantial ground for difference of opinion an immediate appeal from the order might materially enhance the ultimate determination of the litigation. So, too, would an immediate appeal herein have materially advanced the ultimate determination of the litigation.

The Government of the Virgin Islands by not making an immediate appeal was able to get two opportunities to try the same case. If they lost, as they did, in the trial court, they could then appeal on the grounds that they had not waived a jury trial. Here, by consenting to go ahead to trial without a jury the Government of the Virgin Islands waived its jury rights a second time. This double waiver prevents the Government of the Virgin Islands from now asserting a denial of jury rights, if the first waiver had not been effective.

The third question presented is whether a defendant in a civil case waives a right to a jury trial by consenting to the dropping as a party of another defend-

ant who made the only jury demand. When the District Court dismissed the case against the other defendants, the Government of the Virgin Islands consented to the dismissal.

The Court of Appeals, in its opinion, stated that the fact that Collins was allowed to drop his action against Benjamin with the Government's *consent* had no effect on the Government's right to a jury trial.

Rule 38(d) of the Federal Rules of Civil Procedure provides that a demand for trial by jury made within Rule 38 may not be withdrawn without the consent of the parties. Here the Government of the Virgin Islands consented to the dismissal of the action as against the other defendants. Implicit within this consent to the dismissal was a consent to the withdrawal of the jury demand made by the defendant Benjamin. When the Government agreed to allow the case to be dropped as against Benjamin, it, at the same time, waived any claim that it had to a jury based on Benjamin's jury demand with respect to those issues embraced by his demand which were common to the Government of the Virgin Islands.

The ruling of the trial court in denying a jury trial was in agreement with the overall policy considerations of the Federal Rules of Civil Procedure. Under the Federal Rules of Civil Procedure it is very simple to get a jury trial. All one must do is request one in accordance with Rule 38(a). Rule 38(a) provides that a jury demand must be made within 10 days after the last pleading is filed. This rule is interpreted strictly. Although the right to jury is an important right, it is

lost unless the technical requirement of the Federal Rules of Civil Procedure are met. Ample opportunity is given to a party to demand a jury and if he does not exercise his right within the prescribed time, his right is gone forever.

According to this basic policy regarding the right to jury in the Federal Courts, it is clear that the Government of the Virgin Islands had ample opportunity to demand a jury at the outset. It need have only indorsed its answer requesting a jury. This it failed to do. It therefore lost its right to a jury trial. The Government of the Virgin Islands was only protected by the jury demand made by Benjamin as to the issues embraced within that demand.

Although historically the value of jury trial is highly regarded "today these views are not universally accepted, and assertions are made that trial by jury is a luxury which can no longer be afforded." 2B Barron and Holtzoff, Federal Practice and Procedure, Section 871 (Wright ed. 1961). In James, Trial by Jury and the New Federal Rules of Procedure, 45 Yale L.J. 1022, 1026, it is stated:

> "The right of jury trial should not be expanded. This method of settling disputes is expensive and dilatory—perhaps anachronistic. Indeed, the number of jury trials should be cut down if this can be done so as not to jeopardize the attainment of the other objectives."

The Court of Appeals discussed the "presumption" against waiver of the right to jury trial. In this connection, it is stated in *Transocean Airlines v. Pan*

American World Airways, Inc., 36 F.R.D. 43 (S.D. N.Y. 1964) that "there is no longer any occasion to indulge any presumption against waiver."

It should be noted that with respect to Rule 39(b) giving the trial court discretion in allowing a jury trial when a demand is not made timely, it has been held that to invoke the Court's discretion in granting a jury trial extraordinary circumstances should appear. *Leve v. General Motors Corp.*, 248 F.Supp. 344 (S.D.N.Y. 1965); *Gottesman v. Texas Petroleum Co.*, 26 F.R.D. 623 (S.D.N.Y. 1961); *Second-Seventy-Ninth Street Company v. United States Steel Corp.*, 22 F.R.D. 98 (S.D.N.Y. 1958). So too should such extraordinary circumstance appear to negate the finding of a waiver as herein involved.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
MELVIN M. BELLI
Attorney for Petitioner.

Of Counsel:
ROBERT L. LIEFF
BELLI, ASHE, GERRY & ELLISON
THOMAS D. IRELAND
MAAS AND IRELAND

(Appendices Follow)

Appendix A

United States Court of Appeals
For the Third Circuit

No. 15250

Harvey B. Collins

vs.

Government of the Virgin Islands of the United States, George Wade, Sr., Aubrey Todman, Luther Benjamin, Clifford Benjamin and "John Doe", a Person, Firm, Association or Incorporation, and Being a Fictitious Name, Jointly, Severally and in the Alternative

Government of the Virgin Islands,
Appellant

No. 15290

Harvey B. Collins,
Appellant

vs.

Government of the Virgin Islands of the United States, George Wade, Sr., Aubrey Todman, Luther Benjamin, Clifford Benjamin and "John Doe", a Person, Firm, Association or Incorporation, and Being a Fictitious Name, Jointly, Severally and in the Alternative

Appeals From the District Court of the Virgin Islands,
Division of St. Thomas and St. John

Argued May 23, 1966

Before Kalodner, Hastie, Circuit Judges and Wright,
District Judge

OPINION OF THE COURT

(Filed September 14, 1966)

By Kalodner, Circuit Judge

Since they are interrelated, these two appeals at Nos. 15250 and 15290, will be separately considered and disposed of in this opinion.

The issue presented, at No. 15250, is whether the defendant-appellant, the Government of the Virgin Islands ("Government"), should have been afforded a jury trial in this personal injury action, tried to the District Court of the Virgin Islands without a jury, which resulted in a judgment for plaintiff-appellee, Harvey B. Collins, in the amount of $550,000.

Collins was seriously injured when the car which he was driving collided with a disabled truck on Harwood Highway, St. Thomas, in the early morning hours of February 4, 1961. The truck, owned by one Luther Benjamin, had been left astride part of the traveled portion of the highway after it blew two rear tires during the afternoon of February 3, 1961. The driver, William Samuel Wade, did not report the breakdown to the authorities. Despite the fact that the authorities subsequently became aware of the presence of the truck, it remained on the highway throughout the afternoon and evening. Collins' car collided with the right rear of the truck while he was returning from town to the submarine base where he was stationed.

On February 1, 1963 Collins filed suit in the District Court of the Virgin Islands to recover for the injuries he received in the accident against Government,

Luther Benjamin, and William Samuel Wade.[1] The complaint charged (Paragraph XVI) that the "accident and collision was caused by, precipitated through and was the proximate result of the carelessness, negligence, omissions and breach of duty of defendants" and prayed for judgment in the sum of $500,000.

Government was named as a defendant pursuant to special legislation, Act No. 921, January 25, 1963, which authorized Collins to file suit against Government and provided that he "may proceed against the Government as in the case of any other defendant".

On March 7, 1963, the defendant, Luther Benjamin, filed an answer to the complaint and on the same day served a copy on attorneys for Collins. The answer denied ¶ XVI of the complaint to the effect that defendants caused the accident by their "carelessness, negligence, omissions and breach of duty" and set up as a "special" defense "the contributory negligence of the plaintiff". Included in the answer was the statement "Defendant requests a Jury Trial".

Government filed its answer on March 27, 1963 and served a copy on the attorneys for Collins on the same day. The answer denied the allegations in ¶ XVI and set up as an affirmative defense that "the plaintiff was guilty of negligence" which "negligence proximately

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[1]Because of some doubt as to the identity of the owner of the truck and the driver, the complaint named as defendants "John Doe", "George Wade, Sr.", "Aubrey Todman", "Luther Benjamin", "Clifford Benjamin" and "the Virgin Islands of the United States". Subsequently it was determined that Luther Benjamin was the owner of the truck and William Samuel Wade the driver.

caused and contributed to cause the matters complained of in plaintiff's complaint". The answer contained no request for trial by jury nor was one filed up to the date of trial by Government.

Following extensive pre-trial discovery, a pre-trial conference was held on October 23, 1964. At that time, the defendant Benjamin was very much involved in the litigation, vigorously opposing a motion by Collins to strike his defense of contributory negligence. On October 24, 1964 Benjamin filed a motion for summary judgment. Trial was to commence on the morning of October 27, 1964; that morning in chambers while the jury waited in the courtroom, Collins moved to dismiss with prejudice the action against all defendants except Government. All parties agreed to this dismissal, and the District Court entered an Order accordingly. The Court then advised Government for the first time that the case would be tried without a jury despite Government's protest that it was entitled to a jury by reason of its reliance upon defendant Benjamin's demand for a jury trial. That afternoon, prior to the commencement of the trial, Government filed with the Court a written "Motion for Trial by Jury". The motion was directed to the discretion of the Court pursuant to Rule 39(b) of the Federal Rules of Civil Procedure. It stressed the fact again that Government had relied on the timely demand for trial by jury made by the defendant Benjamin "whose defense was based on questions of law and fact substantially similar to those relied on by the [Government]". The Court denied Government's motion.

The trial lasted for four days. On December 21, 1964 the Court entered its Findings of Fact and Conclusions of Law. The Court found that "the defendant Government of the Virgin Islands was negligent"; that "defendant's acts and omissions were the proximate cause of plaintiff's injuries"; that "the plaintiff was not guilty of contributory negligence". On December 22, 1964 judgment was entered against Government in the sum of $550,000. This appeal followed.

Government on this appeal contends that it was entitled to a trial by jury in this action because (1) a timely demand for a jury had been made by a co-defendant on which it was entitled to rely, and (2) the Court in the proper exercise of its discretion should have granted its Rule 39(b) motion.[2]

In reply, Collins urges that (1) Government had no right to a trial by jury; (2) if it had such a right, it was waived by failure to make a timely demand for a jury; and (3) the District Court did not abuse its discretion in denying Government's motion pursuant to Rule 39(b) for a jury trial.[3]

We are of the opinion that Government is correct in its contention that it was entitled to a jury trial by virtue of the timely demand for such trial by its co-defendant Benjamin, and that the District Court erred in holding to the contrary. That being so, we do not

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[2]Government also raised other issues on this appeal: the Court's findings did not reflect its own work product; the judgment was contrary to fact and law; the damages awarded were excessive. In view of our disposition we need not consider these points.

[3]Collins also contested Government's claims as to the merits, arguing that the judgment was consistent with fact and law.

reach Government's second contention that the District Court improperly exercised its discretion in denying Government's Rule 39(b) motion.

This must be said preliminarily with respect to Collins' threshold contention that Government, irrespective of all other considerations, had no right to a jury trial:

Government, like the states of the Union and the United States, is immune from suits in actions sounding in tort. This immunity is specifically provided by Act of Congress, 48 U.S.C.A. § 1541(b), which as here relevant, reads:

> "... no tort action shall be brought against the government of the Virgin Islands or against any officer or employee thereof in his official capacity without the consent of the legislature constituted by this chapter and said section."

Government waived this immunity when it enacted Act No. 921. The question as to whether Government having waived this immunity is entitled to a jury trial is free of the impact of the Seventh Amendment to the Constitution[4] since it is clear that a suit against the sovereign was not a suit at common law within the meaning of the Seventh Amendment. Rather the answer must be sought in well-established principles

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[4]Since the Virgin Islands is an unincorporated territory of the United States, c. 558, § 2, 68 Stat. 497, July 22, 1954, the Seventh Amendment to the Constitution would not normally be applicable to suits brought in the territory. Balzac v. People of Porto Rico, 258 U.S. 298, 304-05 (1922). However, the Virgin Islands by statute specifically provides for its application in appropriate situations. 5 V.I.C. § 321.

relating to the waiver of immunity by the sovereign. These may be stated as follows:

(1) "The Government cannot be sued, except with its own consent. *It can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits.* It may restrict the jurisdiction of the court to a consideration of only certain classes of claims against the United States. . . . If the claimant avails himself of the privilege thus granted, he must do so subject to the conditions annexed by the Government to the exercise of the privilege. Nothing more need be said on this subject." McElrath v. United States, 102 U.S. 426, 440 (1880). (emphasis supplied)

(2) The grant of jurisdiction by the sovereign is an aid in determining the method of trial in the absence of an express provision. United States v. Pfitsch, 256 U.S. 547 (1921); 5 Moore, Federal Practice ¶ 38.31(2), at 234 (2d ed. 1964).

Applying these principles to the instant case, we are of the opinion that the Government of the Virgin Islands intended to allow trial by jury in an action such as here brought by Collins. This is plainly indicated by the language of Act No. 921 which declared the terms of the waiver of immunity:

"Section 2. For the purpose of this Act and the adjudication of any such claim, the immunity of the Government to suit is hereby waived and *Harvey B. Collins may proceed against the Government as in the case of any other defendant, sub-*

> *ject to the same procedures and defenses* except for the defense of immunity from suit or of the statute of limitations, the provisions of which are hereby expressly waived; . . ." (emphasis supplied)

Thus, "the forms of pleading and the rules of practice to be observed" in this suit are expressly stated to be the same as in the ordinary tort action between private litigants. In such an action it is hornbook law that the parties are entitled to a trial by jury. This is the clear meaning of Government's emphasis on the fact that it be treated as "any other defendant".

Our conclusion is further supported by the fact that this was an action at law. Consistent with the principle enunciated in United States v. Pfitsch, *supra*, a grant of jurisdiction to the District Court recognizable at law carries with it a right to jury trial.

Collins seeks to avoid this result by relying on a line of cases which hold that there is no right to a jury trial in a "suit authorized by Territorial law against a municipality, based upon a moral obligation only", citing Guthrie National Bank v. Guthrie, 173 U.S. 528, 534 (1899). *Guthrie* is inapposite to our situation. *Guthrie* involved suits to recover debts owed by provisional governments of four villages established within the Territory of Oklahoma. Rules applicable to suits against municipalities which are subdivisions of the Government do not control suits against the Government itself. Collins has been misled by the term "Municipality of St. Thomas" which enjoys a special meaning in Virgin Islands' history. See Harris v.

Municipality of St. Thomas & St. John, 212 F.2d 323, 326 (3 Cir. 1954).

Although Government had the right to ask for trial by jury, this right could be waived if it failed to comply with Rule 38 of the Federal Rules of Civil Procedure.[5] Rule 38, provides in relevant part:

> Jury Trial of Right
>
> "(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.
>
> "(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. . . .
>
> "(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

The only timely demand for jury trial in this action was the general demand of defendant Benjamin

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[5]The same reasoning which leads us to hold that Government was entitled to jury trial, requires us to conclude that the "procedure" of this suit is controlled by the Federal Rules of Civil Procedure.

indorsed on his answer. Government made no demand, and thus, under Rule 38(d) waived its right to jury trial unless it was entitled to rely on the demand of its co-defendant. We are of the opinion that Government was so entitled.

In considering questions involving the right to jury trial, we must keep in mind certain well-settled principles:

Since "the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver" Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393 (1937).

" 'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' *Dimick v. Schiedt,* 293 U.S. 474, 486." Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1959).

These principles lead us to conclude that the better rule is that a defendant can rely on the jury demand of a co-defendant to the extent of the issues embraced by that demand. This is the result suggested by the leading commentators on the Federal Rules of Civil Procedure. Thus 5 Moore, Federal Practice ¶ 38.45, at 343-44 (2d ed. 1964) states:

> "In other words if a timely and proper demand for jury is made all other parties in the action who are affected by the demand may rely thereon and need not make a jury demand for issues embraced therein."

Similarly, 2B Barron & Holtzoff, Federal Practice and Procedure, § 877, at 49 (Wright ed. 1961) concludes:

> "Where a timely and proper demand for a jury is made by one party, all of the parties to the action who are interested in the issues as to which jury trial has been demanded may rely thereon and need not make an additional demand of their own."

DePinto v. Provident Security Life Insurance Company, 323 F.2d 826 (9 Cir. 1963), cert. den. 376 U.S. 950 (1964), is in accord.

There, one of the plaintiffs in a derivative stockholders' action against officers and directors of a corporation, filed a timely demand for a jury trial which he sought to withdraw prior to the trial. One of the defendants consented to the withdrawal; the others did not. None of the defendants moved for a jury trial. The case was then tried to the District Court with an "advisory jury". The District Court, thereafter, disregarded some of the advisory jury's findings and made its own findings of fact on its holding that defendants in a derivative stockholders' action are not entitled to a jury trial. On appeal, it was held that since one of the grounds asserted in the suit was negligence on the part of the defendants in the performance of their fiduciary duties, an issue was presented recognizable at common law, entitling the defendants to a jury trial. It was further held that since the defendants-appellants had not consented to the withdrawal of the jury trial demand of one of the plain-

tiffs, that they had not waived trial by jury. In so holding, the Court said at page 832:

> "Appellees point out that none of the appellants filed a demand for a jury trial prior to the original trial, and argue from this that they waived trial by jury.
>
> "It is provided in Rule 38(d), Federal Rules of Civil Procedure, that the failure of a party to serve such a demand constitutes a waiver of trial by jury. *But Rule 38(d) further provides that a demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties. It follows that failure to demand a trial by jury does not constitute a waiver if such demand is withheld in reliance upon a demand filed by another party, and if withdrawal of the latter demand is not consented to.*" (emphasis supplied)

Cf. DeGioia v. United States Lines Company, 304 F.2d 421, 425 (2 Cir. 1962). Compare Arrington v. McCarty, 136 So. 2d 119 (La. Ct. of App. 1961). In this connection, Collins' contention that any reliance should be strictly limited to adverse parties is without merit. The language of Rule 38 refers to "party" generally and cannot be read in the manner suggested by Collins.

Additional support for the proposition that Government is entitled to rely on the demand by its co-defendant for a jury is found in Rule 39(a), Federal Rules of Civil Procedure, which provides in part that "when trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action." Since an initial demand for a jury

will cause the designated issues to be docketed for jury action, it becomes superfluous for another party to make a similar demand, and hence such a party should be allowed to rely on the initial demand.

The defendant Benjamin's demand for a jury trial was a general one, indorsed on his pleading and not directed to specific issues. As such, it was deemed to cover all issues triable by a jury. Rule 38(c), Federal Rules of Civil Procedure. Collins argues that the demand made by Benjamin cannot aid Government because the "issues" embraced within that demand are not the same as those between Collins and Government. He also urges that the theories of negligence are different as between Benjamin and Government and that the standard of care owed by Government is different as between the two. We do not find the differences asserted by Collins dispositive in the present situation. This was an action instituted by a single complaint against Government and other defendants seeking to hold them jointly and severally liable for the same injury to Collins. As previously noted, ¶ XVI of the complaint charged the defendants jointly with "carelessness, negligence, omissions and breach of duty" and prayed for judgment against all defendants in the sum of $500,000. The answer of Benjamin controverted the allegations in ¶ XVI and raised the issue of contributory negligence. Government's answer denied ¶ XVI and claimed the injury was due to the negligence of Collins. Under these circumstances, and keeping in mind the well-settled principles in regard to jury trial, earlier referred to,

we hold that where co-defendants are sued on the theory that they are jointly and severally liable for the same injury arising out of a single occurrence, a request by one for a jury trial on the issues of negligence and contributory negligence enures to the benefit of the other as well.[6]

We reach this decision mindful of the fact that reliance by one party on the jury demand of another must be kept within proper limits if it is not to interfere with the orderly administration of justice. Thus resort to the theory of reliance will not aid a defendant whose demand for a jury trial was timely as to one party, but not as to another because the parties had filed their last pleadings on different dates, Christenson v. Diversified Builders Incorporated, 331

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[6]The same result has been reached by other courts through an application of Rule 39(b), Federal Rules of Civil Procedure. The leading case is Spiro v. Pennsylvania R. Co., 3 F.R.D. 351 (S.D.N.Y. 1942), almost identical on its facts with the present case. Plaintiff brought a personal injury action against the Pullman Company and the Pennsylvania Railroad. His demand for jury trial was made within ten days of the answer of the Pennsylvania Railroad but was not timely as to the Pullman Company's answer. The Court held that plaintiff had preserved his right to jury trial as to the "separate liability" of the railroad and the "joint negligence" of the defendants, but had waived it as to the "separate liability" of Pullman. However, since all issues but the "separate liability" of Pullman were to be tried to a jury, the Court in its discretion under Rule 39(b) ordered that all issues as to both defendants be tried to a jury. "Any other course would either deprive plaintiff of his constitutional right to a jury trial or would lead to duplication and confusion." (3 F.R.D. at 352) For more recent authority see Cataldo v. E. I. DuPont DeNemours & Co., 39 F.R.D. 305, 308 (S.D.N.Y. 1966). While recognizing that the interests of justice are served by either approach to the problem, we prefer to treat the question as coming within the language of Rule 38.

F.2d 992 (10 Cir. 1964), cert. den. 379 U.S. 843; nor where jury trial is sought as to third party issues and the only demand for jury trial was that indorsed upon the original complaint, McAndrews v. United States Lines Company, 167 F.Supp. 41 (S.D.N.Y. 1958), citing 5 Moore, Federal Practice ¶ 38.45, at 344, note 2 (2d ed. 1964). In the instant case, however, there was a single complaint arising from one occurrence charging joint liability for the same injury. Under these circumstances, justice is best served by permitting Government to rely on the jury demand of its co-defendant.

Finally, the fact that Collins was allowed to drop his action against Benjamin with Government's consent has no effect on Government's right to a jury trial. Once a jury trial has been demanded, trial must be had by jury unless there is a "written stipulation" or "oral stipulation made in open court" consenting "to trial by the court sitting without a jury". Rule 39(a), Federal Rules of Civil Procedure. See also, Rule 38(d), Federal Rules of Civil Procedure. Here there was no such stipulation by Government.

There remains for disposition the appeal at No. 15,290.

Following Judgment in his favor, Collins moved for an award of attorneys' fees pursuant to 5 V.I.C. § 541(b). This motion was denied by the District Court on the ground that "attorneys' fees cannot be awarded to a party against the Government". Collins then appealed, urging that attorneys' fees can be awarded against the Government of the Virgin

Islands and that under the terms of the statute such an award is mandatory.

Since we hold that the District Court erred in denying Government a jury trial, and that a new trial must be granted, Collins is no longer a "prevailing party" within the meaning of 5 V.I.C. § 541(b). Accordingly, his appeal at No. 15290 becomes moot. However, as the question may arise again following retrial, we call attention to our recent decision in Smith v. Government of the Virgin Islands, 361 F.2d 469, 471 (1966), to the effect that an award of attorneys' fees under 5 V.I.C. § 541(b) is a matter of judicial discretion.

For the reasons stated, the Judgment of the District Court will be reversed, and the cause remanded for a new trial with directions to proceed in accordance with this Opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix B

In the District Court of the Virgin Islands
Division of St. Thomas and St. John

Civil No. 27-1963

Harvey B. Collins,
Appellee,

vs.

Government of the Virgin Islands of the United States, George Wade, Sr., Aubrey Todman, Luther Benjamin, Clifford Benjamin and "John Doe", a person, firm, association or incorporation, and being a fictitious name, jointly, severally and in the alternative

Government of the Virgin Islands,
Appellant.

Background Statement

This is an action for damages by Harvey B. Collins, (affectionately called by his friends "Rip" Collins) against the Government of the Virgin Islands, George Wade, Sr., Aubrey Todman, Luther Benjamin, Clifford Benjamin and "John Doe".

The Government of the Virgin Islands was named as a defendant by authority contained in Bill No.

1719 of the Fifth Legislature of the Virgin Islands of the United States where it waived the immunity of the Government of the Virgin Islands to suit.

The plaintiff, on October 27, 1964, moved to dismiss the action as against all defendants except the Government of the Virgin Islands. The motion has been granted and George Wade, Sr., Aubrey Todman, Luther Benjamin and Clifford Benjamin, have been dropped from the case.

The plaintiff was represented by Maas and Ireland (Thomas D. Ireland, Esq., of counsel) of Charlotte Amalie, Virgin Islands and Belli, Ashe & Gerry (Melvin M. Belli, Esq., of counsel) of San Francisco, California.

The defendant, Government of the Virgin Islands, was represented by the Attorney General of the Virgin Islands, Francisco Corniero, Esq.

The trial of this case before the Court without a jury commenced on October 27, 1964. The Court heard the testimony of witnesses and arguments of counsel and on October 30th, 1964, took the matter under advisement. The Court has reviewed the testimony of all the witnesses, the exhibits, has done extensive legal research in the matter and makes the following:

Findings of Fact

I

Harvey B. Collins is a citizen of the United States, and on February 3rd and 4th, 1961, was a member of

the United States Navy Underwater Demolition Team 21 temporarily stationed in St. Thomas, Virgin Islands of the United States.

II

On February 4th, 1961, plaintiff Harvey B. Collins was 30 years of age, and in excellent health. His life expectancy would be forty additional years.

III

The Virgin Islands of the United States are an unincorporated territory of the United States of America created by the Organic Act of 1936 (Act of Congress, June 22, 1936, Ch 669, 49 Stat. 1807) and the Revised Organic Act of 1954 (Act of Congress, July 22, 1954, Ch 558, 68 Stat. 497).

IV

At all times stated herein the Harwood Highway was and still is a public street, thoroughfare and highway on the Island of St. Thomas, Virgin Islands of the United States. The said highway was and is the property of, and under the control of, the Government of the Virgin Islands of the United States.

On January 22, 1963, the Fifth Legislature of the Virgin Islands of the United States passed Bill No. 1719 wherein it waived the immunity of the Government of the Virgin Islands to suit, and granted plaintiff the right to proceed against the Government as in the case of any other defendant in connection with personal injuries sustained by plaintiff arising out of

an automobile accident of February 4, 1961, which is the subject of the complaint herein. The said Bill was signed by the Governor of the Virgin Islands and became effective on January 25, 1963.

VI

It is the duty and responsibility of the Government of the Virgin Islands through its departments and agencies to administer for the protection of persons and property within the jurisdiction of the Virgin Islands; to keep the public highways in good serviceable condition and to repair and maintain same; and to administer, supervise, and enforce the regulations and laws covering the operation and control of motor vehicles and use of the streets and highways, and direct and control traffic and supervise and enforce the laws relating thereto; and to protect persons and property, including users of public highways, and to enforce obedience to the laws, and to rules and regulations issued in pursuance of law, throughout the Virgin Islands. The Government of the Virgin Islands has admitted to these duties and responsibilities.

VII

On February 3, 1961, George Wade Sr., while operating the truck of Luther Benjamin and while the said truck was traveling in a westerly direction and at approximately two o'clock P.M. on February 3, 1961, did, as a result of two (2) flat tires on the right rear of the vehicle, stop, park and abandon the said truck in the traveled portion of Harwood High-

way, and in an area where parking is prohibited by law, to wit: on the South side of Harwood Highway to the East of the submarine base road intersection and at a point approximately South of that building known as Arthur's Bamboushay Club. The truck was a Chevrolet truck modified to a dump truck, which was loaded with several tons of wet sand. The two right rear wheels were removed and its right rear axle rested upon concrete blocks. The said truck was parked and abandoned at a spot in a main highway on the island of St. Thomas, at a point where the highway is twenty-four (24) feet wide. The truck completely blocked the left lane of the highway, which is the lane traveled by users of the highway in the Virgin Islands.

VIII

The plaintiff was driving westerly on Harwood Highway in a Volkswagen "Microbus" at about 2:45 A.M. on Saturday, February 4, 1961, at which time the plaintiff struck the rear end of the truck.

IX

From the time the truck was parked and abandoned, at approximately 2:00 P.M. on February 3, 1961, until sometime after the accident occurred at 2:45 A.M. on February 4, 1961, the truck bore no reflectors, no tail lights nor any warning devices of any kind. There were no flares, barriers, or lights of any description to mark its presence on the highway.

X

The defendant Government of the Virgin Islands, through its agent police officers of its Department of Public Safety, had actual knowledge that the said truck was abandoned on the Harwood Highway without any warning devices to note its presence, and were aware that it constituted a danger, hazard, and nuisance for a period of at least two hours and forty-five minutes before plaintiff struck it.

At about midnight February 3-4, a citizen telephoned the police department and reported the truck's presence on the highway without lights, reflectors or other warning devices and advised the police department that he had almost collided with the truck and suggested that warning devices be placed around the truck to avoid an accident. At approximately 12:30 A.M., February 4th, a police cruiser containing two police officers, on routine patrol noted the presence of the truck, stopped and looked at it. They considered it a sufficient hazard, nuisance, and danger to attempt to locate flares to place around the truck, but did not do so because the flares were "not available" or "locked-up". The police continued on their routine inspection trip to the west of the location of the truck returning approximately one and a half hours later when they again noted the truck as a danger, hazard and nuisance. They then returned to police headquarters and had noted in the police logbook:

"2:00 A. M. Patrolman Colon and Niles present from making an inspection of Bourne Field, Sub-

Base, French Town and reported all quiet and that there is a dump truck park (sic) on the Harwood Highway."

The police officers took no steps whatsoever to warn users of the highway of this abandoned unlighted truck which they, the police officers, recognized as a distinct danger, hazard, and nuisance. The police officers had ample time, capacity and ability, before the accident, to mark the truck in such a manner as to warn users of the highway of its presence

After the accident, the same police officers placed a flashlight on the rear of the truck to mark its presence.

XI

A number of citizens narrowly missed crashing into the truck during the evening and night hours of February 3-4, 1961. Two drivers would probably have struck the truck had not last minute warnings been shouted by another person in the car, seated to the right of the driver, permitting the driver to swerve into the other lane.

XII

The abandoned truck was situated on a straightaway just after a curve to the left. The absence of lights or reflectors on the truck, its color, the background and overhead foliage, the position of street lights, and the truck's location combined to create a hazard, danger and nuisance to users of the highway.

XIII

The plaintiff, Harvey B. Collins, is and was a total abstainer from alcoholic beverages, a non-drinker, and was sober at the time of the accident.

XIV

At approximately 2:45 A.M. on February 4, 1961, the plaintiff, while driving alone in a westerly direction, struck the abandoned unlighted truck from the rear. The physical evidence together with the testimony of the plaintiff's expert in this case, show that the plaintiff swerved his vehicle to the right at the last moment in an apparent effort to avoid the truck. The left front cab of plaintiff's vehicle was stuck in under the bed of the truck. The plaintiff was pinned in his vehicle. Citizens arrived upon the scene within minutes. One of the first to arrive on the scene was a physician. The plaintiff was semi-conscious and in pain. Rescuers used pieces of wood, iron bars and a cutting torch to extricate the plaintiff from his vehicle. Considerable damage was caused to the plaintiff's vehicle from these rescue operations. The abandoned truck was virtually undamaged.

XV

As a direct result of the accident and the negligence of the defendant, the plaintiff has suffered the following:

a. Permanent brain damage from a compound depressed skull fracture in the left frontotemporal area with motor aphasia and hemiparesis.

Three operations have been performed. The first on February 4, 1961 and the second on February 5, 1961, were life saving operations during which fragments of bone and blood clots were removed from the plaintiff's brain substance. Portions of the brain substance were also removed. Damage to the plaintiff's brain substance has affected those areas controlling reasoning, speech, reading, writing, the emotions and personality.

b. The plaintiff suffered a right side paralysis and now is a partial paraplegic on his entire right side including involvement of his sexual organ and inability to use his right hand.

c. The plaintiff is an epileptic, with grand mal seizure, and must remain upon Delantin and Phenobarbital as anticonvulsant medication. He has had at least three grand mal seizures since the accident. There is no cure for plaintiff's epilepsy.

d. Further brain surgery may be necessary to prevent further grand mal seizures.

e. The plaintiff is unable to read or write as a result of the permanent brain damage.

f. The plaintiff is subject to bizarre personality changes; he suffers from temper tantrums and abnormal emotional outburst.

g. The plaintiff cannot drive an automobile.

h. The plaintiff is the sole supporter of his wife and two minor children.

i. The plaintiff is totally and permanently injured and is unemployable with the possible exception that he may be able to do custodial work providing he is able to control his temper and emotional disturbances.

j. The plaintiff has reached the maximum of physical and mental improvement possible. No further recovery can be expected.

k. The plaintiff will need permanent future medical care.

XVI

At the time of the accident the plaintiff had an earning capacity of at least four hundred and seven dollars ($407.00) per month and an assured job that would have brought him a salary up to seventy-eight hundred dollars ($7800.00) within five (5) years.

XVII

The reasonable value of the plaintiff's past medical expenses is ten thousand dollars ($10,000.00).

XVIII

The reasonable estimated value of the plaintiff's future medical expense is ten thousand dollars ($10,000.00).

XIX

There is no evidence that the plaintiff was driving other than with due care. The plaintiff suffers from retrograde amnesia and has no recollection of the accident or anything prior thereto for a period up to fifteen minutes prior to the accident. There is no evidence to rebut the presumption that plaintiff was driving with other than due care. There is no evidence that the plaintiff was guilty of contributory negligence.

XX

The negligence of the Government of the Virgin Islands was the proximate cause of the accident and of plaintiff's injuries.

The Court concludes from the foregoing Findings of Fact the following:

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and this cause of action.

2. The defendant Government of the Virgin Islands was negligent in that its agent employees did, after due notice, both actual and constructive, of the existence of a hazard, nuisance and breach of the laws on the Harwood Highway, wilfully fail to keep the said highway in a reasonably safe condition and did wilfully fail to administer, supervise and enforce the regulations and laws covering the operation of motor vehicles and use of the streets and highways and did fail to protect the users of said highway; and did after due notice both actual and constructive, of the existence of the said hazard, nuisance and resulting breach of the laws wilfully fail to mark the said truck's presence with appropriate lights or flares and did wilfully fail to warn the users of the highway of its location; and did wilfully allow the said dangerous condition and nuisance to remain for many hours and negligently and wilfully failed and neglected to take any precaution whatsoever to remove, abate, diminish, offset or counteract this dangerous condition and nuisance.

3. The abandoned truck constituted a *public nuisance* and an *absolute nuisance* unlawful under the Virgin Islands Code. (Prosser, LAW OF TORTS § 70 (1955); 14 V. I. C. 1462; 20 V. I. C. 463d, 497d, 20 V. I. R. & R. 491-106; 23 V. I. C. 96.)

4. The officials of the Government of the Virgin Islands violated the law and were negligent by maintaining the public nuisance and by wilfully omitting to perform their legal duty to remove the public nuisance or take steps to abate or offset it as a public nuisance. (3 V. I. C. 252, 257, 23 V. I. C. 1, 2, 6; 20 V. I. C. 491; 23 V. I. C. 94, 96, 125; 14 V. I. C. 1461, 1462; *Taylor v. City of Cincinnati,* 143 Ohio St. 426, 55 NE2d 724, 728.)

5. The misconduct of defendant in omitting to perform its duties was wanton and wilful.

6. Defendant's acts and omissions were the proximate cause of plaintiff's injuries.

7. The plaintiff was not guilty of contributory negligence. (Restatement of Torts, Sec. 477. The burden of establishing the plaintiff's contributory negligence rests upon the defendant.)

8. The plaintiff can recover a verdict in excess of his *ad damnum* clause. Rule 54 (c) *Federal Rules of Civil Procedure; Federal Practice and Procedure,* Barron & Holtzoff, Vol 3, § 1194; *Couto v. United Fruit Co.,* C. A. 2d, 1953, 203 F. 2d 456; *Audi Vision Inc. v. RCA Mfg. Co.,* C. C. A. 2d, 1943, 136 F. 2d 621, 147 A. L. R. 574.)

9. Plaintiff is entitled to recover for damages: (See *Leming v. Oilfield Trucking Company*, 282 P. 2d 23)

a. Medical services incurred	$ 10,000.00
b. Loss of past earnings	22,000.00
c. Future medical expense	10,000.00
d. Loss of future earnings	238,000.00
e. Pain and suffering, including pain and suffering and physical discomfort from injuries and resulting operations and treatment, and continuing pain and suffering from injuries and partial right side paralysis, past and future, embarrassment, humiliation and ridicule, including loss of enjoyment of life, and including loss of compatability with his wife and loss of sexual enjoyment, past and future	270,000.00

Plaintiff shall recover from defendant the total sum of $550,000.00

Dated: December 21, 1964

/s/ Walter A. Gordon
Judge

Appendix C

United States Court of Appeals
for the Third Circuit

No. 15,250

Harvey B. Collins,
Appellee,

vs.

Government of the Virgin Islands of the United States, George Wade, Sr., Aubrey Todman, Luther Benjamin, Clifford Benjamin and "John Doe", a person, firm, association or incorporation, and being a fictitious name, jointly, severally and in the alternative

Government of the Virgin Islands,
Appellant.

(D. C. Civil No. 27 - 1963)

Appeal from the District Court of the Virgin Islands,
Division of St. Thomas and St. John

Present: Kalodner and Hastie, Circuit Judges, and
Wright, District Judge.

JUDGMENT

This cause came on to be heard on the record from the District Court of the Virgin Islands, Division of St. Thomas and St. John, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court, filed December 22, 1964, be, and it is hereby reversed, with costs, and the cause remanded for a new trial with directions to proceed in accordance with the opinion of this Court.

September 14, 1966

Attest:
Ida O. Creskoff,
Clerk.

Appendix D

United States Court of Appeals
for the Third Circuit

No. 15,250

Harvey B. Collins,
Appellee,

vs.

Government of the Virgin Islands of the United States, George Wade, Sr., Aubrey Todman, Luther Benjamin, Clifford Benjamin and "John Doe", a person, firm, association or incorporation, and being a fictitious name, jointly, severally and in the alternative

Government of the Virgin Islands,
Appellant.

Present: Staley, Chief Judge, McLaughlin, Kalodner, Hastie, Smith, Freedman, Seitz, Circuit Judges and Wright, District Judge.

The petition for rehearing filed by Appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who

concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

(Signed) Kalodner,
Circuit Judge.
Ida O. Creskoff,
Clerk.

Dated: October 10, 1966.

Appendix E

In the District Court of the Virgin Islands
Division of St. Thomas and St. John

Civil No. 27-1963

Harvey B. Collins,
Appellee,

vs.

Government of the Virgin Islands of the United States, George Wade, Sr., Aubrey Todman, Luther Benjamin, Clifford Benjamin and "John Doe", a person, firm, association or incorporation, and being a fictitious name, jointly, severally and in the alternative

Government of the Virgin Islands,
Appellant.

JUDGMENT

The trial of this case before the Court without a jury came on for hearing on October 27, 28, 29 and 30, 1964. The testimony of witnesses was taken and arguments of counsel were made. The Court took the matter under advisement and on December 21, 1964 entered its Findings of Facts and Conclusions of Law.

It is the Judgment of the Court that the plaintiff, Harvey B. Collins, shall recover against the defendant, Government of the Virgin Islands, the sum of Five Hundred and Fifty Thousand Dollars ($550,000.00) and costs of the prosecution of this cause of action.

December 22, 1964

/s/ WALTER A. GORDON
Judge

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

HARVEY B. COLLINS,
Petitioner,

vs.

GOVERNMENT OF THE VIRGIN ISLANDS OF THE UNITED STATES, GEORGE WADE, SR., AUBREY TODMAN, LUTHER BENJAMIN, CLIFFORD BENJAMIN and "JOHN DOE" a Person, Association or Incorporation, being a fictitious name, jointly, severally and in the alternative,
Respondents.

No. 951

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FRANCISCO CORNEIRO
Attorney General of the Virgin Islands
Department of Law
St. Thomas, Virgin Islands

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

HARVEY B. COLLINS,
Petitioner,

vs.

GOVERNMENT OF THE VIRGIN ISLANDS OF THE UNITED STATES, GEORGE WADE, SR., AUBREY TODMAN, LUTHER BENJAMIN, CLIFFORD BENJAMIN and "JOHN DOE" a Person, Association or Incorporation, being a fictitious name, jointly, severally and in the alternative,
Respondents.

No. -----

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Opinions Below

The opinion of the Court of Appeals is reported at 366 F. 2d 279 (3rd Cir. 1966). The opinion of the District Court is reported at 236 F. Supp. 441 (1964).

Questions Presented

1. Whether a party in a civil case can rely on a timely demand for a jury trial made by another defend-

ant who was dropped as a party immediately before trial, where such initial demand was not limited to specific issues.

2. Whether the defendant's subsequent participation in a trial after raising objections to the denial of a jury demand constitutes a waiver of a right to a jury trial.

Statutes and Rules Involved

Rule 38 of the Federal Rules of Civil Procedure provides in part:

> "(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.
>
> "(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.
>
> "(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

Rule 39 of the Federal Rules of Civil Procedure provides in part:

> "(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.
>
> "(b) By The Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any or all issues."

Act No. 921 of the Fifth Legislature of the Virgin Islands of the United States, approved January 25, 1963, provides:

> "To Consent to the Institution of an Action in Court Against the Government of the Virgin Island by Harvey B. Collins, in Connection With Personal Injuries Sustained by Harvey Collins.
>
> "Be it enacted by the Legislature of the Virgin Islands:
>
> "Section 1. Harvey B. Collins is authorized to file suit against the Government of the Virgin Islands on his claim for losses arising out of injuries sus-

tained on February 4, 1961, as a result of an automobile accident as to which Harvey B. Collins alleges the Government of the Virgin Islands to be liable.

"Section 2. For the purpose of this Act and the adjudication of any such claim, the immunity of the Government to suit is hereby waived and Harvey B. Collins may proceed against the Government as in the case of any other defendant, subject to the same procedures and defenses except for the defense of immunity from suit or of the statute of limitations, the provisions of which are hereby expressly waived; Provided, That nothing contained herein shall be construed as an admission of liability on the part of the Government.

"Section 3. The Claimant, Harvey B. Collins, shall commence the action authorized by this Act within two months from the effective date of this Act.

"Section 4. This Act shall take effect upon its approval."

Statement

Respondent adopts as its statement of the facts material to the consideration of the questions here presented the summary of the facts contained in the opinion of the Court of Appeals.[1]

Reasons for Denying the Writ

The Court of Appeals has correctly decided that the Government of the Virgin Islands was entitled to a jury trial by virtue of the timely demand for such trial by another defendant.

---

[1] See Pet. App. A. pp. 1a through 5a and 336 F. 2d 279.

The Appellant's contention that this decision of the Third Circuit Court of Appeals is in conflict with the decision of the Ninth Circuit in the case of *United Press Association* v. *Charles,* 245 F. 2d 21 (9th Cir.) cert. denied 77 S. Ct. 1378 (1957) is clearly erroneous. This case cited by petitioner, when rightly understood, is direct authority for allowing a jury trial. The basic question presented in *United Press Association* v. *Charles, supra,* was whether the Court could grant to a defendant a jury trial *sua sponte.* In that case neither plaintiff nor defendant asked for a jury trial within ten days after the issues were made. Thereafter defendant filed a motion for jury trial, which motion was denied. Subsequently the trial judge entered an order directing jury trial *sua sponte.*

The Court stated:

> "There is no express prohibition of jury trial in the Constitution, treaties or laws of the United States. There is no express denial of the right of a trial judge to call a jury in any civil trial in the Federal Rules of Civil Procedure." *Id* at 23.

It is further said in that opinion:

> "Had the Rules contained any express prohibition of jury trial under any set or circumstances, it is probable that the Supreme Court of the United States would not have adopted such provisions, and it is equally probable that Congress would not have approved them." *Ibid.*

Thus, *United Press Association* v. *Charles, supra,* clearly emphasizes the unquestionable custom of the trial courts to grant a jury trial where the situation has

demanded it, even when none of the parties made a timely demand for such trial or where there has been a waiver by the parties. See, e. g., *Arnold* v. *Trans-American Freight Lines, Inc.*, 1 F. R. D. 380 (S. D. Mich. 1940). Moreover, public policy often compels the granting of a jury in a law case in the face of waiver by the particular parties. *Rodenbur* v. *Kaufman*, 320 F. 2d 679 (D. C. Cir. 1963); *Supplies, Incorporated* v. *Aetna Casualty & Surety Co.*, 18 F. R. D. 226 (W. D. Pa. 1955); *Ohlinger's Federal Practice*, p. 524. Also Rule 39(b) of the *Federal Rules of Civil Procedure* provides in part:

> "... notwithstanding the *failure of a party to demand a jury* in an action in which such a demand might have been made of right, the court may order a trial by jury ..." (emphasis added)

Accordingly, respondent submits that in *United Press Association* v. *Charles* neither party made a timely demand for a jury trial whereas in the instant case a timely demand was made by a party to the action.

The Government of the Virgin Islands was entitled to rely on the jury demand made by another defendant. Defendant Benjamin filed his answer to the plaintiff's complaint on March 7, 1963 and at that time made a demand for a jury trial.

Thereafter, on March 28, 1963 the Government filed its answer and did not make its own demand. Its failure to demand a jury trial was predicated upon its reliance on the prior demand made by defendant Benjamin. Moreover, if the Government had been the first to file its answer to the plaintiff's complaint

and had then failed to demand a jury trial, the petitioner more appropriately might have argued that its failure to file such a demand for jury trial constituted a waiver. In 5 Moore Federal Practice, sec. 28.45 at 343-44 (2nd Ed. 1964) it is stated:

> "In other words if a timely demand for jury is made, all other parties in the action who are affected by the demand may rely thereon and need not make a jury demand for issues raised therein."

Likewise, in 2B Barron and Holtzoff, Federal Practice and Procedure sec. 877, at 49 (Wright Ed. 1961) it is said that:

> "Where a timely and proper demand for a jury is made by one party, all of the parties to the action who are interested in the issues as to which jury trial has been demanded may rely thereon and need not make an additional demand of their own."

In this action one of the defendants made a timely demand. This demand by the co-defendant was not limited as to specific issues. It has been stated that the defendant may specify certain issues, and if so, any other party may serve a demand as to other issues, but if the original demand is not so limited, all issues triable by a jury will be deemed covered. *Ring* v. *Spina, et al.*, 166 F. 2d 546 (2nd Cir. 1948); *Wilson* v. *Kennedy*, 75 F. Supp. 592 (W. D. Pa. 1948); 2B Barron and Holtzoff, Federal Rules of Procedure, sec. 871, p. 49.

The Court of Appeals was correct in holding that:

> "Since an intial demand for a jury will cause the designated issues to be docketed for jury action, it becomes superfluous for another party to make

> a similar demand, and hence such a party should be allowed to rely on the initial demand."

This reasoning is in keeping with the purpose and spirit of the Federal Rules of Civil Procedure which was adopted to secure "a just, speedy and inexpensive determination of every action." See Rule 1.

Petitioner contends that the demand made by one defendant cannot aid the respondent because the facts underlying the several legal theories were very different. Petitioner's brief, p. 13. We concur with the Court that the differences asserted by the petitioner are not dispositive of this situation, 366 F. 2d at 285. As the defendant's demand for a jury trial was a general demand, it covered all the issues between the Appellant and all the other defendants, including the issue of contributory negligence. In this connection, the trial court itself had denied appellant's motion to strike the defense of contributory negligence which was raised by both the defendants Benjamin and the Government. Accordingly, the trial court was aware that there existed a common issue as between all the defendants on the one side and the appellant on the other. It is well settled that in determining the essential character of a suit, the entire pleadings and all the issues raised are to be examined and not merely the plaintiff's complaint, petition or evidence. To uphold the appellant's contention would certainly preclude an appraisal of the defense of contributory negligence raised by all the defendants. Moreover, it has been held that a jury trial should not be denied simply because there is no real defense to an action which is

properly triable by a jury. *Jackson* v. *General Finance Corp.*, 253 P. 2d 166 (1953).

It is beyond dispute that the facts to be adduced on the issue of contributory negligence would be the same as to both the Government and the defendant Benjamin. Appellant also recognized that there was a common issue as between the defendant Benjamin and the Government. Appellant's brief, p. 17. *Ergo* the general demand would have embraced all the issues triable by the jury. In *Cataldo* v. *E. I. DuPont De Nemours and Company,* 39 F. R. D. 305 (S. D. N. Y. 1966), the plaintiff sued for injuries caused by an explosion of the defendant's can of lacquer on the theory of negligence and amended his complaint to allege a second cause of action based on a breach of warranty. The Court held that where there will be a jury trial of some of the issues in an action, the court may order a jury trial of all the issues in that action. Also in *Consolidated Fisheries Co.* v. *Fairbanks Morse & Co.,* 9 F. R. D. 539 (E. D. Pa. 1949) the court held that the plaintiff was entitled to a jury trial of the issues raised by the counterclaims and reply where such issues arose out of the same transaction, which was the subject of the amended complaint thus entitling the plaintiff to a jury trial on all the issues. The Court reasoned that since much of the evidence would be the same on the trial of the issues, the District Court could grant a jury trial of all of the issues.

In the case at bar this action was commenced by a single complaint against the Government and other defendants charging them jointly and severally liable for the same injury to the plaintiff. As the injury

arose out of the same occurrence, certainly the same evidence as to negligence and contributory negligence would be relevant to all the parties involved.

It is undeniable that a personal injury action involves legal issues which are cognizable in a court of law. Accordingly, the holding of the Court of Appeals is in accord with the ruling in *United States* v. *Pfitsch,* 256 U. S. 547 (1921), where it has been asserted that a grant of jurisdiction to the District Court recognizable at law carries with it a right to jury trial. See also *DePinto* v. *Provident Security Life Insurance Co.,* 323 F. 2d 826 (9th Cir. 1963) cert. denied 376 U. S. 950 (1964). With perhaps a few exceptions, trial by jury has always been and still is, regarded as the normal preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. *Dimick* v. *Schiedt,* 293 U. S. 474, 79 L. Ed. 603 (1935). It is entirely proper for the jury to determine the question of liability and the extent of the injury by an assessment of damages. Both are questions of fact.

Concerning the right to jury trial it has been well established that courts will indulge every reasonable presumption against waiver. *Aetna Insurance Co.* v. *Kennedy,* 301 U. S. 389, 393; 81 L. Ed. 1177 (1937); *Beacon Theatres* v. *Westover,* 359 U. S. 500, 510, 3 L. Ed. 2d 988 (1959).

It has also been stated:

> "Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. *Dimick* v. *Sch-*

redt, 293 U. S. 474, 486, 79 L. Ed. 603;" *Beacon Theatres, Inc.* v. *Westover, supra.*

We submit that in the instant case there was never a waiver of a jury trial. A waiver of right to a jury trial must of necessity be an intentional act. *Hoover* v. *Abell,* 231 S.W. 2d 217 (1950); *Burke Grain Co.* v. *St. Paul-Mercury Indemnity Co.,* 94 F. 2d 458 (8th Cir. 1938). Certainly, the Government's conduct to operate as a waiver of the right to a jury trial must be inconsistent with the rights already asserted; to wit, reliance on the written demand of defendant Benjamin, and the motion made by the Government at the commencement of the trial.

The failure to make a timely claim, Federal Rules of Civil Procedure, 38(d) is limited by the explicit provision of Federal Rules of Civil Procedure 39(a) that once a demand for jury trial has been properly made it can be waived by an oral stipulation made in open court and entered in the record by written stipulation. There was certainly no such waiver by the Government in the manner in which the Federal Rules of Civil Procedure prescribes.

The appellant contends that the Government waived its right to a jury trial by proceeding to trial after the trial court denied the demand for a jury trial. It is well established that subsequent participation in a trial after a denial of a demand for a jury trial does not constitute a waiver of a jury trial. See, e. g. *Jackson* v. *General Finance Corp.,* 253 P. 2d 166 (1953); and *Burke Grain Co.* v. *St. Paul-Mercury Indemnity Co.,* 94 F. 2d 458 (8th Cir. 1938). In the latter case the court held that a defendant did not waive his right to

a jury trial in a federal court by requesting special findings by the court and excepting to those proposed by the plaintiff after the court had denied the defendant a jury trial and therefore was not precluded from complaining of a denial of a jury trial.

In addition, an order denying a jury trial is interlocutory and not appealable, although it is subject to appellate review later after a final judgment is entered in the case. *Black* v. *Boyd,* 248 F. 2d 156, 159 (6th Cir. 1957); *In re Chappell and Co.,* 201 F. 2d 343 (1st Cir. 1953); *Blaunit Mills, Inc.* v. *Eday Fabric Sales Corporation,* 124 F. 2d 563 (2nd Cir. 1942). Furthermore, the situation is analogous to that presented where both sides move for a directed verdict but one of them asks that the issues be submitted to the jury if motion is denied. In such case it is well settled that a party does not waive the right to go to the jury by joining in the motion to the court. *Peterson* v. *Sucro,* 93 F. 2d 878 (4th Cir. 1938); *Starfed Properties, Inc.* v. *Ettinger,* 131 F. 2d 575 (2d Cir. 1943).

Here the defendant Benjamin was actively engaged in the litigation until the morning the trial was to commence. While the jury was in the courtroom, the appellant moved to dismiss the action against all parties except the Government. The Court informed the Government for the first time that the case would be tried without a jury despite the Government's protest. The Government then filed a Motion for Jury Trial pursuant to Rule 39(b) of the Federal Rules of Civil Procedure and indicated that it had relied on the timely demand for a trial by jury made by the defendant Benjamin. See 366 F. 2d at 281. In view of these cir-

cumstances surrounding the denial of the Government's demand for a jury trial and in light of the weight of authority, the position of the appellant that the Government should have refused to participate in the trial proceeding lacks merit. His contention certainly warrants the application of the statement of the Court in *United Press Association* v. *Charles, supra,* that: "Medieval scholasticism could furnish no more pedantic example of the disregard of actuality in pursuit of logic." *Id* at 26.

It is clear that had the defendant Benjamin not been dropped from the case there would have been no question of the entitlement of the Government of the Virgin Islands to a jury trial. The mere fact that the defendant Benjamin was dropped just before trial should not militate against the grant of this fundamental privilege to the Government.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

FRANCISCO CORNEIRO
Attorney General of the Virgin Islands
Department of Law
Quarters "B"
P. O. Box 280
St. Thomas, Virgin Islands